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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

DR. F. ALLEN RUTHERFORD, Louise Walther, Sally Ranich, Vera Mae Jeffries, C. R. Easter, Dorothy Williams, each in behalf of their own person, and in behalf of all persons afflicted with cancer, and approximately thirty-two million Americans now living who will die with cancer,

Petitioners,

v.

THE AMERICAN MEDICAL ASSOCIATION, INC., an Illinois Corporation, The American Cancer Society, Inc., a New York Corporation, The American Cancer Society, San Francisco Division, California, and Dr. _____ Batchelder (first name unknown) and

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, Dr. Warren G. Cole, Dr. Danley Slaughter, Dr. Virginia Pierce, Dr. George D. Stoddard, and

DR. KENNETH M. ENDICOTT, Arthur Furst, Paul Kirk, Gene R. Hay, Michael Deddish, Joseph M. Regan, Guy F. Robbins, Albert Segaloff, Austin Smith, Henry A. Szujewski, Paul Wermer, Oliver Field, R. Edwin Moore, Daniel Abrahamson, John William Blue, Mrs. John W. Blue, Carl R. Baurlen, William E. Braunig, R. W. Case, Joseph Cox, Gilbert Goldhammer, John R. Heller, William Kupp, Boisfeullet Jones, George P. Larrick, T. C. Maariveglia, Howard Mayfield, Willard G. Orr, Robert Palmer, Thomas Rice, George Schwartzman, Clifford Shane, R. D. Sherman, Ted J. Smolenski, Norman P. Booker, and other persons unknown,

Respondents.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FRANK O. WALTHER
Attorney for Petitioners

130 Booth Lane
Haverford, Pennsylvania
Telephone: 215-MI 9-0542

THE LEGAL INTELLIGENCER, 10 S. 37TH ST., PHILA. 19104

INDEX

	Page
Reasons for Granting Rehearing and Issuing Writ ...	2
Conclusion	5
Certificate of Counsel	7
Exhibits	8
Letter of Dr. Ivy, January 31, 1968	9
Letter of Judge Durovic, January 26, 1968	11
Affidavit of Louis L. Retallack, M.D.	12
Affidavit of I. Harvey Feigley, M.D.	13
Affidavit of M. Dale Yocum, M.D.	15
Affidavit of James Woodrow Clark, M.C.	16

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Respondents.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that this Court grant a rehearing of its order of January 15th, 1968, denying the petition for a writ of certiorari in the above entitled case and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit in the above entitled case as prayed for in the petition filed November 20, 1967, which judgment dismissed the suit of petitioners seeking to establish their right to enjoin a conspiracy denying them as individuals the fundamental Constitutional right to life and survival through access to and use of a non-toxic medical remedy of their own choice, which has alleviated their affliction and is necessary for their survival, where no other effective remedy exists for them and they have hitherto been declared terminal.

REASONS FOR GRANTING REHEARING AND ISSUING WRIT

1. The threatened mortal jeopardy which these petitioners prayed this Court to avert has now materialized.

The petitioners have now been advised by the sponsors that, by reason of threat of criminal prosecution by Government Agencies, they are unable to distribute to the petitioners, or any other cancer patients similarly situated, the anti-cancer remedy Krebiozen which has alleviated their affliction and is vital to their continued survival and freedom from pain. As a consequence they, and other cancer patients similarly situated and otherwise pronounced doomed, if this court, their last resort, continues to refuse to entertain their plea, will now painfully die.

They will so die regardless of, and long before completion of, any possible compliance by the sponsors with any relevant or applicable federal statutory and administrative regulatory procedures for permissive interstate distribution of, to them, this vital remedy. This is especially so where, as in this case, such procedure involves public rectification of past erroneous and gratuitous, prejudging,

published reports by regulatory federal agencies knowingly falsely denying [1] even the physical existence of this remedy [2] and, a fortiori, its effectiveness.

2. This petition therefor presents to this Court, the question whether it will reconsider its refusal to exercise its discretion to permit the saving of the lives of these petitioners and of thousands of other pronounced "hopeless" cancer victims.

The sworn testimony and documented voluminous scientific, chemical and clinical reports and exhibits submitted and filed with this Court, subject to its examination, demonstrate that Krebiozen is prima facie effective to arrest and alleviate the otherwise fatal cancer of these victims. No evidence to the contrary has been submitted. These petitioners advise that they are prepared to substantiate the effectiveness of this remedy in a hearing by testimony of recognized independent scientific laboratories and of more than nine hundred reputable physicians who have themselves actually treated "terminal" cancer patients with this remedy.

The respondents are accused of preventing the petitioners and such other cancer victims from obtaining this life preserving remedy (even though, and whether or not, the sponsors [3] have repeatedly tried, as they have in 1954

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[1] See Congressional Record of December 6, 1963, pages 22492-22504 (pages 10-22 of reprint copy attached to original of petition) containing verbatim submitted and known reports scientifically differentiating Krebiozen from creatine as to infra-red spectrographic and as to chemical analysis, made by the Anderson Physical Laboratory, Urbana-Champaign, Illinois, and by the Clark Microanalytical Laboratory, Urbana, Illinois—also a report that the N. C. I.'s own combustion analysis showed a carbon content for Krebiozen of only 21 per cent as contrasted with a carbon content for creatine of 36.6 percent.

[2] Nevertheless the F. D. A. autocratically adheres to its published pronouncement of September 7, 1963, that it has determined Krebiozen to be no more than creatine, a harmless but ineffective body substance, which finding it reiterates is "scientifically unimpeachable".

[3] The sponsors have in no way contributed, directly or indirectly, to this suit, financially or otherwise.

and 1961 under the F.D.C.A. Act, or may try again,[4] to obtain federal license to distribute it). As the Court of Appeals expressly recognizes, this accusation inescapably constitutes "a full frontal attack on defendants, the American Medical Association, The American Cancer Society . . .". However, it does not, and cannot, constitute an attack on "the medical profession generally", as that Court would hold, since the members thereof, as members of, dependent for medical information on, and subject to professional and economic disciplining by that Association, have today no direct or effective elective or representative voice in its management or actions. Nor can it constitute an attack, as that Court would also hold, against "the Federal Food and Drug Administration", which is not even joined as a respondent.

At no point have these respondents substantiated any denial of these allegations constituting this accusation.

The Court of Appeals and the District Court refuse to countenance such a "frontal attack" where made against respondents such as the American Medical Association and the American Cancer Society. Such Courts have instead resolutely refused to grant a hearing which would permit the disclosure of the true facts as to this unnecessary past and continuing sacrifice of life, and put a stop to it.[5] Will

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[4] The futility, however, of any such new application is apparent from the article derogating Krebiozen, published in 1966 by the American Cancer Society for continuing circulation among members of the American Medical Association staffing federal agencies and practicing outside of such agencies. This article has just come to petitioners' attention and a facsimile is attached to the original of this petition. Attention is also directed to the article of April 17, 1967, (while this suit has been in progress) published in the Journal of the American Medical Association for similar circulation (collaborated in by respondent, Gilbert Goldhammer) entitled "The Krebiozen Story—Is Cancer Quackery Dead?" which quotes the public statement of the Commissioner of the F.D.A. that Krebiozen is "a cruel hoax. Each day a person with treatable cancer relies upon Krebiozen is a day that brings him closer to death." A facsimile of this article is also attached to the original of this petition.

[5] Attention is directed to the record in this case.

not this Court do otherwise, to permit the saving of the lives of these Petitioners and other cancer victims similarly situated?

3. These lower Courts have now established that the right of a private individual to unfettered access to a non-toxic vital medical remedy of such individual's own free choice is judicially unenforceable and therefore illusory. This Court in the past has been alert to validate individual liberty and the concept that government is the servant of the people, not their master. This Court, it is submitted, should not now permit the judicial validation by these lower Courts of this bureaucratic and monopolistic usurpation of dominion over all citizens in medical matters, especially when such dominion is used, as now, to fatally jeopardize the lives of the petitioners and all other cancer victims similarly situated.

4. There are attached copies of letters of the sponsors of Krebiozen, received since this Court denied the Petition for Certiorari, advising that by reason of the threat of prosecution of such sponsors made through agents of the Food and Drug Administration, although they are willing and desirous, they are unable to distribute Krebiozen, even without charge, to the petitioners. The original letters are attached to the original of this petition.

5. There are also attached affidavits of reputable physicians of the petitioners and others averring that continued administration to them of Krebiozen is vital to their continued survival and freedom from pain. The original affidavits are also attached to the original of this petition.

Conclusion

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that considerations of humanity, society and Constitutional rights warrant that a rehearing be granted and that upon such rehear-

ing a writ of certiorari issue to the Court of Appeals for the Seventh Circuit, or in the alternative, that the decision of that Court be vacated and this suit remanded to the District Court for a hearing on the facts.

Respectfully submitted,

FRANK O. WALTHER
Attorney for Petitioners

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, but because of the exigencies of the present situation, involving preservation of life, and is restricted to grounds specified in Rule 58 of the Rules of this Court.

FRANK O. WALTHER
Attorney for Petitioners

EXHIBITS

Letter of Dr. Ivy dated January 31, 1968

Letter of Judge Durovic dated January 26, 1968

Affidavits of doctors as to effectiveness and necessity of continued availability of Krebiozen for their patients

ROOSEVELT UNIVERSITY

430 SOUTH MICHIGAN AVENUE

CHICAGO 5, ILLINOIS • WABASH 2-3580

January 31, 1968

Messrs. Louise Walther,
Sally Ranich, Vera Mae Jeffries
and C. R. Easter

Dear Sir and Mesdames:

To write this letter gives me great anxiety and heartsickness as I fully realize its effects on all of your lives by the denial of the anticancer therapy which, in my opinion and in the opinion of hundreds of eminent physicians has prolonged those lives. My long experience in medicine teaches me that Krebiozen or its equivalent Carcalon show great promise of making valuable contributions to human knowledge in the control and management of the disease of cancer with which all of you are afflicted. Each and every one of you were told by members of the medical profession that your lives were near at an end years ago. As a scientist in the field of medicine I am fully convinced that Krebiozen or its equivalent Carcalon have prolonged them and its further administration would prolong them indefinitely. However, this cannot be done as I can no longer furnish this therapy to you through your doctors for scientific and experimental research outside of the State of Illinois despite the fact that the Department of Health, Education, and Welfare has in both the years 1954 and 1961 determined that Krebiozen comes within the provisions of the Public Health Service Act and not under the Federal Food, Drug and Cosmetic Act, and that under the provisions of the Public Health Service Act, the Attorney General of the United States had ruled in 1912 that substances which come within the provisions of the Public Health Service Act can be legally distributed interstate for scientific and experi-

mental research, so long as they are not for sale, barter, or exchange. I have never taken a penny for either Krebiozen or Carcalon in my life nor do I intend to do so. My interest is exclusively scientific.

However, I must inform you that the agents of the Food and Drug Administration have called on me, and that agency has written to me a letter to the effect that (1) they have evidence that I have been giving out Krebiozen or its equivalent Carcalon to people to carry over state lines, and (2) that they consider such action to be illegal under the Federal Food, Drug and Cosmetic Act. Mr. John Sembower, my attorney and I have believed such action to be legal, since the product is not for sale, barter, or exchange under the supervision of a licensed physician. That is why I have been giving it to you and other patients.

I went to Washington to see an attorney who is a specialist in the Food and Drug Administration Law, and he advises me to cease giving it to persons to take the therapy out of the state. So, you can see why, regardless of my humane feelings and great desire, and regardless of my conviction that Krebiozen or its equivalent, Carcalon does prolong your lives, and that irreparable damage to your lives will result in its denial, that although I wish to give this remedy free of charge to you and other patients to be used by your physicians for scientific and experimental research, exclusively, I must, unfortunately defer to this attorney's advice.

With best wishes, I am

Very sincerely yours,

A. C. IVY, M.D.

KREBIOZEN RESEARCH FOUNDATION

a nonprofit organization devoted to research

Suite 2324, Bankers Building

105 WEST ADAMS STREET, CHICAGO, ILLINOIS 60603

DEarborn 2-3515

January 26, 1968

Messieurs and Mesdames Louise Walther,
Sally Ranich, Vera Mae Jeffries, C. R. Easter
and Dorothy Williams
c/o Frank O. Walther, Esquire
130 Booth Lane
Haverford, Pennsylvania

Although we are able and willing to furnish you with Krebiozen, without charge, it is with regret that I must inform you that it is no longer possible for the above Foundation to furnish it to you or any other cancer patient living outside the state of Illinois until the question as to whether it is legally permissible to ship Krebiozen to such patients has been legally resolved.

Steven Durovic, M. D.,

by
/s/ Marko Durovic

Marko Durovic
acting under Power-of-Attorney

AFFIDAVITS

County of Denver :
State of Colorado : SS.

I, LOUIS L. RETALLACK, M.D., being duly sworn according to law depose and say:

1. I am a duly licensed physician under the laws of the state of Colorado and practice my profession in the county of Denver, state of Colorado.

2. Presently I am treating a patient afflicted with the disease of cancer with the drug known as Krebiozen. The results of this treatment are in my opinion beneficial in the control of the disease and it shows promise in making valuable contributions to human knowledge in the treatment of cancer.

3. My administration of Krebiozen for this patient has resulted in the substantial fulfilment of the following recognized medical criteria:

(a) The maintenance of the will to live through awareness that effective action is thus provided to alleviate the patient's symptoms and to arrest the disease.

(b) The reduction or eradication of the primary lesion and of other metastatic lesions.

(c) The reduction of pain and dispensation of necessity for pain relieving drugs.

(d) The lack of any harmful side effects in connection with the use of this drug.

4. Krebiozen in the case of this patient is fulfilling significantly the realization in this patient of the above four medical criteria and objectives which, in this case cannot thus be realized through the use of other recognized drugs, surgery or radiation therapy. I have no hesitation in stating that in my judgment, as an experienced physician,

Krebiozen has prolonged the life of this patient and ameliorated his condition and denial of further Krebiozen therapy to him would be inhumane and result in irreparable damage to his life and health.

5. The name and medical records of this patient now under my care will be made available to any court of competent jurisdiction upon order or request of such court.

LOUIS L. RETALLACK, M.D.

Sworn to before me on the 4th day of February, 1968.

GLADYS G. ROWLAND
Notary Public

My Commission expires Dec. 20, 1969.

County of Bucks :
State of Pennsylvania : SS.

I, HARVEY FEIGLEY, being duly sworn according to law depose and say:

1. I am a duly licensed physician under the laws of the state of Pennsylvania and practice my profession in the city of Quakertown, state of Pennsylvania.

2. Presently I am treating with the medical remedy known as Krebiozen a patient who was hopelessly terminal because afflicted with the disease of cancer. When initially administered the condition of the patient was such that he could not be conscious of the nature of the treatment administered. The results of this treatment are in my opinion beneficial in the control of the disease and for some years

it has now restored this patient to normal life pursuits. It shows great promise in making valuable contributions to human knowledge in the treatment of cancer.

3. My administration of Krebiozen for this patient has resulted in the fulfilment of the maintenance of the will to live through awareness that effective action is thus provided to alleviate the patient's symptoms and to arrest the disease, the reduction or eradication of the primary lesion and of other metastatic lesions, and the reduction of pain and dispensation of necessity for pain relieving drugs. There has been a lack of any harmful side effects in connection with the use of this remedy.

4. Krebiozen in the case of this patient is fulfilling significantly the realization in this patient of the above medical criteria and objectives which, in his case cannot thus be realized through the use of other recognized drugs, surgery or radiation therapy. I have no hesitation in stating that, in my judgment, as an experienced physician, Krebiozen has prolonged the life of this patient and ameliorated his condition and denial of further Krebiozen therapy to him would be inhumane and result in irreparable damage to his life and health.

5. The name and medical record of this patient now under my care will be made available to any court of competent jurisdiction upon order or request of such court.

HARVEY FEIGLEY, M.D.

Sworn to before me on the 3rd day of February, 1968.

ARTHUR G. BARTHOLOMEW
Justice of the Peace

My Commission expires Jan., 1972.

County of Lebanon :
State of Pennsylvania : SS.

I, M. DALE YOCUM, being duly sworn according to law depose and say:

1. I am a duly licensed physician under the laws of the state of Pennsylvania and practice my profession in the city of Lebanon, state of Pennsylvania.

2. Presently I am treating Dorothy Williams as a patient afflicted with the disease of cancer with the drug known as Krebiozen. The results of this treatment are in my opinion beneficial in the control of the disease and it shows promise in making valuable contributions to human knowledge in the treatment of cancer.

3. My administration of Krebiozen for this patient has resulted in the substantial fulfilment of the following recognized medical criteria:

(a) The maintenance of the will to live through awareness that effective action is thus provided to alleviate the patient's symptoms and to arrest the disease.

(b) The reduction or eradication of the primary lesion and of other metastatic lesions.

(c) The reduction of pain and dispensation of necessity for pain relieving drugs.

(d) The lack of any harmful side effects in connection with the use of this drug.

4. Krebiozen in the case of this patient is fulfilling significantly the realization in this patient of the above four medical criteria and objectives which, in her case cannot thus be realized through the use of other recognized drugs, surgery or radiation therapy. I have no hesitation in stating that, in my judgment, as an experienced physician, Krebiozen has prolonged the life of this patient and amelio-

rated her condition and denial of further Krebiozen therapy to her would be inhumane and result in irreparable damage to her life and health.

M. DALE YOCUM, M.D.

Sworn to before me on the 5th day of February, 1968.

ELIZABETH R. JAMES
Notary Public

My Commission expires Feb. 2, 1969.

County of Montgomery :
State of Pennsylvania : SS.

I, JAMES WOODROW CLARK, being duly sworn according to law depose and say:

1. I am a duly licensed physician under the laws of the State of Pennsylvania and practice my profession in the town of Wynnewood in the State of Pennsylvania.

2. I have treated several patients afflicted with the disease of cancer with the medical remedy known as Krebiozen. This remedy has been available to these patients without charge on all occasions. The results of this treatment in my opinion have been beneficial in the control of the disease and this substance shows promise in making valuable contributions to human knowledge in the treatment of cancer.

3. My administration of Krebiozen has been based upon the fulfilment of the following recognized medical criteria:

(a) Maintenance of the will to live.

(b) The maintaining of continuing awareness on the part of the patient that maximum action is being constantly taken to alleviate each symptom which develops, and to bring about an arrest of the disease.

(c) The employment of those therapeutic procedures which in the judgment of the responsible physician are best calculated to accomplish one or the other of all the following objectives:

(i) Eradication of the disease—to include the eradication of the primary lesion, and any metastatic lesions.

(ii) The amelioration of pain and other adverse signs and symptoms—whether eradication of the disease is considered to be highly probable, or is considered to be impossible.

(iii) The maintaining of the patient in the maximum state of physical, mental, and emotional well-being obtainable under the circumstances of the diseased state, and the therapeutic procedures.

(d) The side effects, which experience has demonstrated to be associated with a therapeutic procedure, should be inconsequential, or the impact of any significant side effects upon the physical and emotional state of the patient should be justified when compared with the *ultimate* benefit which may be expected from the therapeutic procedure.

4. Because Krebiozen in combination with other medical or surgical procedures, fulfills to a significant degree, especially in comparison with other cancer therapy, the requirements inherent in these four criteria, continuation of Krebiozen therapy is essential to the adequate medical

management of the several cancer patients who are now under my medical supervision. I have no hesitation in stating that, in my judgment as an experienced physician, Krebiozen prolonged the lives of these patients and denial of further Krebiozen therapy to these patients would be a great tragedy the result of which would be irreparable damage to the lives and well-being of these patients.

The names and medical records of these patients will be made available to any court of competent jurisdiction or on any order or request from such court.

JAMES WOODROW CLARK, M.D.

Sworn to before me the sixth day of February, 1968.

WILLIAM E. COMPTON
Notary Public

My Commission expires July 29, 1970.